

## THE "MORTMAIN" ACT IN OHIO

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The Ohio "Mortmain" Act, restricting testamentary gifts to charities unless executed at least one year prior to the death of the testator,<sup>1</sup> has had a long and somewhat turbulent existence. Enacted in 1874,<sup>2</sup> and with no legislative changes in substance, yet the trail of judicial interpretation has been somewhat tortuous and provides now an uncertain map of the future.<sup>3</sup> Many other states have acts limiting this right to make testamentary gifts to charities, as do England and many Canadian provinces.<sup>4</sup> California, Florida, Georgia, Idaho, Iowa, Mississippi, Montana, New York, Pennsylvania and the District of Columbia<sup>5</sup> have restricted the right for many years and, although different statutory approaches have been made, they are all concerned with the same basic problem of controlling to some extent the charitable gift. The Ohio Act is unique among the acts of the several jurisdictions in only one respect—the one year before death limitation. Whether this be a vice or a virtue will be one of the problems considered herein.

The need for legislation restricting and channelizing the procedures for effectuating gifts to charities was felt at an early time and was first formalized in The Mortmain Act of 9 Geo. II, C. 36 (1736) in England. At that time the primary motivating force for restricting the gift was to prevent further accumulations of property by the ecclesiastics.<sup>6</sup>

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<sup>1</sup> Ohio Rev. Code §2107.06 (1953) "If a testator dies leaving issue, or an adopted child, or the lineal descendants of either, and the will of such testator gives, devises, or bequeaths such testator's estate, or any part thereof, to a benevolent, religious, educational, or charitable purpose, or to any state or country, or to a county, municipal corporation, or other corporation, or to an association in any state or country, or to persons, municipal corporations, corporations, or associations in trust for such purposes, whether such trust appears on the face of the instrument making such gift, devise, or bequest or not, such will as to such gift, devise, or bequest, shall be invalid unless it was executed at least one year prior to the death of the testator." Held constitutional, *Patton v. Patton*, 39 Ohio St. 590 (1883).

<sup>2</sup> 71 Ohio Laws 48 (1874).

<sup>3</sup> Note the problem of whether the gift is void or voidable in *Patton v. Patton*, 39 Ohio St. 590 (1883); *The Board of Trustees of The Ohio State University v. Folsom*, 56 Ohio St. 701, 47 N.E. 581 (1897); *Deeds v. Deeds*, 94 N.E. 2d 232 (Ohio Prob., 1950); *Kirkbride v. Hickok*, 155 Ohio St. 293, 98 N.E. 2d 815 (1951).

<sup>4</sup> See Joslin, "Mortmain" in *Canada and the United States*, 29 Can. B. Rev. 621 (1951).

<sup>5</sup> Cal. Prob. Code §41 (1949); Fla. Stat. §731.19 (Supp. 1953); Ga. Code Ann. §113-107 (Supp. 1951); Idaho Code Ann. §14-326 (1949); Iowa Code §633.3 (1954); Miss. Code Ann. §671 (1942); Mont. Rev. Codes Ann. §91-142 (1947); N. Y. Dec. Est. Law. §17; Pa. Stat. Ann. Tit. 10, §17, and Tit. 20, §195 (1950); D.C. Code Ann. §19-202 (1951).

<sup>6</sup> See Zollman, *American Law of Charities*, 362 (1924); *In re Pearce Estate*, 10 B.C.R. 280, 282 (1903); *Attorney General v. Day*, 1 Vis. Sen. 218, 223 (1748); preamble to The Mortmain Act of Geo. II, C. 36 (1736).

Yet it should be noted that the gap through which the great bulk of the property was moving to religious uses was the "death bed" period. This Act of 1736, then, intended to remove the danger area by providing that all gifts and conveyances for charitable uses must be by deed executed before two witnesses, delivered twelve months before death, and enrolled within six months after its execution. Whereas the present Ohio Act<sup>7</sup> restricts only testamentary gifts within one year, the original Mortmain Act prohibited inter vivos gifts within a year and prohibited all testamentary gifts to charities. All jurisdictions in the United States having "Mortmain" Acts recognize the problem and restrict the "death bed" testamentary gift, the method and scope varying among them.<sup>8</sup> Those having no direct legislation covering this matter may treat these problems on theories of undue influence or fraud, but they fall far short in application in the area of charitable gifts.

Unquestionably, the direction of these Acts has changed since the English Act of 1736, from preventing amassing of great wealth in the "dead hand" of the Church to a protection of certain persons who are subjects of the testator's bounty. The Ohio Court has repeatedly asserted this view. "It is therefore apparent that this statute is intended to operate merely as a limitation upon the testator's power of disposition, for the protection of the heir against improvident wills or wills made under undue influence."<sup>9</sup> "The purpose of this section is clear. It is to prevent a testator, under the fears incident to impending death, from disposing of his estate to the prejudice of his descendants."<sup>10</sup> The Florida Court, in 1956, stated when concerned with a similar statute, "the statute must be so construed as to secure full protection to the shielded class. . ."<sup>11</sup> Although the ultimate objective of these Mortmain Acts has changed from a limitation on the charities' accumulations to that of the protection to certain persons close to the testator, the danger point has not changed and is still the principal target of the "modern mortmain" acts, *i.e.*, that period before death when a testator may be overly influenced by and subjected to blandishments or importunities of others, or his own emanating desire to religious or charitable acts which may so often arise during the penultimate months before death. The New York Court stated the problem thus, "in the fear of death men who never exhibited a charitable impulse suddenly awake to the fact that behind them are lost opportunities for usefulness, and in order to balance the

<sup>7</sup> Ohio Rev. Code §2107.06 (1953).

<sup>8</sup> See Statutes cited note 5 *supra*. It may be argued that New York and Iowa have no time before death restriction but in fact the death bed aspect is dealt with in the total restriction.

<sup>9</sup> *Thomas v. The Trustees of Ohio State University*, 70 Ohio St. 92, 108, 70 N.E. 896, 898 (1904).

<sup>10</sup> *Ruple v. Hiram College*, 35 Ohio App. 8, 11, 171 N.E. 417, 418 (1928) and see *Campbell v. Musart Society*, 131 N.E. 2d 279, 282 (Ohio Prob., 1956). Deeds v. Deeds and *Kirkbride v. Hickok supra*, note 3.

<sup>11</sup> *In re Pratt*, 38 So. 2d 499, 501 (Fla. S. Ct. 1956).

account, they look about for an opportunity to do good and find at once a man, who, without hesitation, begins to play upon the fears and hopes. Given such a man, and such a situation, it is readily conceived that in his thought of self, the just demands of wife, or child or parent might be temporarily lost sight of, and his all devoted to religious or charitable purposes."<sup>12</sup>

Whether the distempering influence be fear, devoutness, or bare personal conceit, it is undeniable that the weight of these influences increases as the realization of impending death becomes more definite. Statutes which to some degree counterbalance this situation are desirable, and upon careful reflection, it does not seem that any responsible segment of our society would object thereto. It is logical to assume that representatives of accepted charitable and religious institutions themselves would desire such restriction as it protects them from the undue influences and importunities of unconscionable and fringe religious and charitable societies which might displace them during the last days of a testator's life.

The Ohio Mortmain Act, Ohio Rev. Code §2107.06 is the type of act which is brief and leaves much to judicial interpretation. Several states have enacted voluminous, detailed statutes in this area,<sup>13</sup> but the need for the courts to interpret has not been curtailed. In an area such as this, wherein the concern is the testamentary gift to charity executed shortly before death, it seems the concise statute with the courts effectuating the intent of the act, is sufficient and over a period of many years may be more desirable than the crystallized detailed act. Certainly the Ohio courts have had fluidity of movement and, although it may be difficult to integrate all decisions and statements made in them, yet it can be said the results have been good.<sup>14</sup>

Once it has been concluded that some restriction on the gift to charities executed in proximity to death is desirable, the problem of determining the time before death within which the gift should be void or voidable presents itself. Similar statutes of other states may be considered at least to determine that period considered by legislators to have been in need of the proscription. The Ohio Act extends the restriction to one year before death. California, Idaho, Montana, Pennsylvania and the District of Columbia have a thirty day or one calendar month restriction, Georgia and Mississippi ninety days, and Florida six months.<sup>15</sup> Ontario and Saskatchewan have six month restrictions and Manitoba twelve months, as does England.<sup>16</sup> New York and Iowa have no direct

<sup>12</sup> Allen v. Stevens, 161 N.Y. 122, 148, 55 N.E. 568, 575 (1899).

<sup>13</sup> Cal. Prob. Code, §41 (1949); N. Y. Dec. Est. Law, §17.

<sup>14</sup> See cases note 3 *supra*.

<sup>15</sup> See note 5 *supra*.

<sup>16</sup> Ontario, The Mortmain and Charitable Uses Act, R.S.O. (1950), C. 241, S. 6, Restriction on inter vivos gifts only; Saskatchewan, R.S.S. (1940), C. 120, S. 8; Manitoba, Man. Stats. (1941-42), C. 48; England, Halsbury's Laws of England (2d ed.), 1940, Vol. IV, par. 190, p. 145.

time before death restriction.<sup>17</sup> At a casual glance it may seem that Ohio, with its one year restrictive period, is more severe than the great majority of restrictive statutes. Upon a more careful scrutiny, however, we find the contrary. California, Georgia, Idaho, Mississippi, and Montana, with less than one year restrictive periods designated, also limit the percentage of the estate that may be devised or bequeathed to charities at any time, and New York and Iowa without directly setting out a restrictive period, actually restrict the percentage that may be given by a testamentary gift no matter how long before death the will was executed.<sup>18</sup> Considering the time element alone, it seems a statute providing that all testamentary gifts to charities, no matter when executed, in excess of one-half the net estate is void as to the excess is more restrictive than a statute permitting the entire estate to be devised or bequeathed if executed more than one year before death. We are not concerned here with the relative merits of a designated time restriction and a percentage of estate restriction, but with the need for eliminating the evil of the charitable devise or bequest unduly influenced by the knowledge of approaching death. The statute restricting the portion of the estate which may be given totally forecloses the death bed evil as to that percent. The statute designating only the time, totally forecloses during that restricted time but is completely open prior to it. It is seen, then, that only Florida, Pennsylvania and the District of Columbia have shorter time restrictions in the full extent and Pennsylvania has an *inter vivos* restriction that strengthens the testamentary restriction.<sup>19</sup>

In determining the desirable length of time for the before death restriction in the present decades, the current statutes should be placed in the era of their enactment. The Georgia Act was passed in 1861,<sup>20</sup> Idaho in 1887,<sup>21</sup> Montana 1877,<sup>22</sup> Pennsylvania 1855,<sup>23</sup> California 1872,<sup>24</sup> District of Columbia 1889,<sup>25</sup> and Ohio 1874,<sup>26</sup> with Florida, the only state of recent enactment, being 1933.<sup>27</sup> Taking into consideration the present average life span, the time within which the mental and physical vigor begins to decline, and the influences which may be exerted in this declining period, it seems a longer time before death restriction could logically be contended for rather than a shorter period, especially where there is no percentage of estate limitation.

Although the Ohio Act restricts testamentary gifts executed within

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<sup>17</sup> See note 5 *supra*.

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Ga. Code, §2388 (1861).

<sup>21</sup> Rev. Stat. of Idaho, §5750 (1887).

<sup>22</sup> Laws of the Territory of Montana, §473, p. 355 (1877).

<sup>23</sup> Laws of Pa., §11, p. 332 (1855).

<sup>24</sup> Amendments to the Codes, p. 276 (1873-74).

<sup>25</sup> Dis. of Col. Comprhd. Stat. §20, p. 493 (1889).

<sup>26</sup> See note 2 *supra*.

<sup>27</sup> 1933 Laws of Fla. Chap. 16103, §20.

one year of death, it does so only if the testator dies with issue, adopted child, or lineal descendant of either surviving. This is the class meant to receive the protection of the death bed restriction.<sup>28</sup> The Ohio Act is unique in that the class named for protection is the narrowest designated by the Acts of any jurisdiction with the exception of Idaho.<sup>29</sup> The most egregious omission in the Ohio Act is that of the wife or husband from the class protected.<sup>30</sup> California, Florida, Iowa, Mississippi, and New York expressly and directly extend the benefits of the statute to both husband and wife, while the District of Columbia, Pennsylvania, and Montana indirectly extend this protection to both.<sup>31</sup> Georgia includes the wife but not the husband in the protected class.<sup>32</sup> Unquestionably, those in greatest need of protection are the children of the testator, as they are not in any way protected by forced heir statutes, yet it seems the wife and husband also should be included in the class receiving the benefit of the statute even though the spouses do have some protection under dower and election to take against the will statutes.<sup>33</sup>

The restriction in the Ohio "Mortmain" Act operates only in the event that the testator dies leaving issue, an adopted child, or lineal descendants of either,<sup>34</sup> yet problems have arisen on the interpretation and scope of this class designation. "Issue" as used in the statute has been interpreted to mean, of the blood of the testator.<sup>35</sup> Issue of the blood, however, may move out from under the protection of the act as indicated by a 1956 decision of the Ohio Court.<sup>36</sup> There it was held under the Ohio Code, fixing legal rights of adopted children, that a grandchild, the only lineal descendant of a testator, adopted by others before testator's death, was no longer issue or lineal descendant of issue within the "Mortmain" Act. This is the correct holding where the adoption law provides, as in Ohio, that an adopted child "shall cease to be treated as the child of his natural parents for purposes of intestate succession."<sup>37</sup> Although Ohio does not permit the adoption of adults,<sup>38</sup> an adult adopted pursuant to and in accordance with the law of a state other than Ohio, which, at the time of the adoption was the domicile of the adopting parent is an "adopted child" within the Ohio "Mortmain" Act.<sup>39</sup> How-

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<sup>28</sup> Ohio Rev. Code §2107.06 (1953). See *Davis v. Davis*, 62 Ohio St. 411, 419, 57 N.E. 317, 320 (1900) and *Deeds v. Deeds*, note 3 *supra*.

<sup>29</sup> See note 5 *supra*.

<sup>30</sup> Note 1 *supra*.

<sup>31</sup> See note 5 *supra*.

<sup>32</sup> *Ibid*.

<sup>33</sup> See Ohio Rev. Code §§2103.02, 2107.39 (1953).

<sup>34</sup> Note 1 *supra*, see also *Davis v. Davis*, note 28 *supra*.

<sup>35</sup> *Theobald v. Fugman*, 64 Ohio St. 473, 60 N.E. 606 (1901). Decided under Rev. Stat. §5915 when statute read "issue of the body." The new wording of statute is not believed to have changed this interpretation.

<sup>36</sup> *Campbell v. The Musart Society*, note 10 *supra*.

<sup>37</sup> Ohio Rev. Code §3107.13.

<sup>38</sup> Ohio Rev. Code §§3107.01(A), 3107.03.

<sup>39</sup> *Barrett v. Delmore*, 143 Ohio St. 203, 54 N.E. 2d 789 (1944).

ever, under Section 2105.15 of the Ohio Revised Code, providing for designation of heirs at law and the specific provision, "Thence forward the person designated will stand in the same relation for all purposes, to such declarant as he could if a child born in lawful wedlock," a designated heir not of the blood of the testator is not issue of the body of the testator and so not in the class protected by the "Mortmain" Act.<sup>40</sup> The soundness of this case may be questioned and the problem could be treated currently by extending the protection of the "Mortmain" Act to designated heirs on a restrictive interpretation of the *Theobald*<sup>41</sup> case especially since the "Mortmain" Act at that time provided "issue of the body,"<sup>42</sup> whereas it now provides "issue,"<sup>43</sup> as the class protected. Illegitimate children of a testator would not be included in the class protected, but in all probability illegitimate children of a testatrix would be included.<sup>44</sup> Certainly, acknowledged children under Section 2105.18<sup>45</sup> would be included in the class protected by the "Mortmain" Act.<sup>46</sup>

In the long history of the Ohio "Mortmain" Act, the most troublesome problem has been that of determining who could assert the protection granted in the Act. The precise problem usually being designated by the question: Is the testamentary gift in contravention of the statute void or voidable? From the Ohio cases it is clear that quite often pronouncements of "void" or "voidable" were loosely used and not intended as broad "closed door" decrees.<sup>47</sup> The problem in the future in Ohio would in all probability be better handled without use of the confining and confusing terms "void" or "voidable," but by the simple test of whether the party asserting the statute is in a position to assert it. Although the case of *Kirkbride v. Hickok*<sup>48</sup> may seem to be a final laying to rest of this problem, one can be quite sure it will arise again.

Because the ultimate aim of the restriction on testamentary gifts to charities is to protect certain designated persons living at the death of the testator, it seems consistent with this purpose to permit only those designated to assert the invalidity. New York and California so pro-

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<sup>40</sup> *Theobald v. Fugman*, note 35 *supra*.

<sup>41</sup> Note 40 *supra*.

<sup>42</sup> Rev. St. §4182.

<sup>43</sup> Ohio Rev. Code §2107.06 (1953).

<sup>44</sup> *Id.* at §2105.17.

<sup>45</sup> *Ibid.*

<sup>46</sup> Note 43 *supra*.

<sup>47</sup> The bequest "because absolutely void immediately at and after the death of the testator." *Patton v. Patton*, 39 Ohio St. 590 (1883). See also *Trustees of Ohio State University v. Folsom*, *supra*, note 3; *Thomas v. Ohio State University*, *supra*, note 9; *Davis v. Davis*, *supra*, note 34; *Barrett v. Delmore*, *supra*, note 39; *Deeds v. Deeds and Kirkbride v. Hickok*, note 3 *supra*.

<sup>48</sup> Note 3 *supra*.

vide by statute<sup>49</sup> and other jurisdictions have so held.<sup>50</sup> The early case of *Patton v. Patton*,<sup>51</sup> permitting the brothers of the testator to receive the benefit of the statute where the only lineal heir survived the testator and then died without invoking its protection, seems to have extended the scope of the Act too far. The statement of the Ohio Court in *Deeds v. Deeds* emphasizes a narrowing of the class who may raise the problem. "Only the persons named in the statute can invoke its protection, and such a statute is not invoked unless the declared purpose of the statute will be served."<sup>52</sup> Yet a year later that court strongly indicated that the statute itself made such testamentary gifts of no effect and its invalidity assertable by others than those in the named class.<sup>53</sup> The legislators by the "Mortmain" Act believed certain close lineal relatives needed protection. To permit others than those in that class to benefit by the Act is to give them an unintended advantage and also to slant an unforeseen penalty on the charitable institution.

It may be said euphemistically that a testator (or those influencing his movements), confronted with the likelihood of an early demise, will plan a legal way of effectuating his (or their) desires. For brevity this area will be denominated: Schemes to evade the "Mortmain" Act. In looking for an avenue of escape from the statute restricting late testamentary gifts to charities, the most obvious is the devise or bequest to a person with an understanding that he will apply the gift to certain charitable objectives.<sup>54</sup> The Ohio Act aims at this path of circumvention by providing, that devises or bequests to any person in trust for charitable purposes "whether such trust appears on the face of the instrument making such gift, devise, or bequest or not." This clearly eliminates this "loop hole" if proof is available that there was an understanding that the seeming absolute testamentary gift in fact was made upon the agreement to apply it to charities.

The *in terrorem* clause may also be used in attempting a near death testamentary gift.<sup>55</sup> For example, a testator may bequeath a small portion of his estate to a child (the only person in the class protected by the statute), then make substantial bequests to charities, with a residuary clause to some object not in the class and also not a charity, and a further provision that if the child take any steps to break any part of the will,

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<sup>49</sup> Note 5 *supra*.

<sup>50</sup> *E.g.*, Taylor v. Payne, 154 Fla. 359, 17 So. 2d 615 (1944); Monahan v. O'Byrne, 147 Ga. 633, 95 S.E. 210 (1918); Karolusson v. Poanessa, 207 Iowa 127, 222 N.W. 431 (1929).

<sup>51</sup> Note 3 *supra*.

<sup>52</sup> *Ibid*.

<sup>53</sup> Kirkbride v. Hickok, note 3 *supra*.

<sup>54</sup> See Schultz's Appeal, 30 Pa. 396 (1876); Leopold Schmucker's Estate, 61 Mo. 592 (1876); Kenrick v. Cole, 61 Mo. 572 (1876); Flood v. Ryan, 220 Pa. 450, 69 A. 908 (1908).

<sup>55</sup> See Kirkbride v. Hickok, note 3 *supra*.

he will be barred from any right to any bequest under the will. If such a device were literally followed by the courts, the bludgeoning effect would certainly deter the child from attempting to challenge the charitable gift. It must be noted that normally there is little "terror" in such a provision unless a residuary clause carries the invalidated charitable gift away from the class protected and away from charities. Otherwise, the end result would be intestate or residuary property passing to the members of the class, perhaps to their greater advantage than that provided in the will.<sup>56</sup>

There seems to be two methods of meeting the *in terrorem* situation. The first is to hold that no person in the class avoids the charitable gift but that the statute itself renders it totally imperative.<sup>57</sup> However, with this approach and where there is a real use of the *in terrorem* feature, the charitable gift would pass away from both the class meant to be protected and the charity. The second method of dealing with this problem seems more desirable in its many ramifications, and that is to hold that the statute must be offensively asserted by members of the class but that the devise used to carry the avoided charitable gift away from the class is part of the charitable disposition and therefore it too is avoided. This would always result in the avoided charitable bequest going back to the relatives of the testator who in all probability are those designated for protection by the "Mortmain" Act. The Ohio Court, in the *Kirkbride* case of 1951, gave a verbal pattern which should be the basis for interpretation of the Ohio "Mortmain" Act. "The obvious answer to this contention is that in nearly every will in which bequests are made to charities it can be said that such bequests form a plan or pattern, but, unfortunately for the charities, the law says that the plan or pattern is disrupted so far as they are concerned if the testator dies within a year from the execution of his will, leaving issue of his body or an adopted child."<sup>58</sup>

#### SUMMARY AND CONCLUSIONS

There is a need to restrict and control, by a specific act, the death bed gift to charitable uses. The greater need is the testamentary restriction, as the general legal principles of undue influence or lack of capacity are particularly impotent in the area of the charitable gift. Such legislation is in no way directed against worthwhile, established religious or charitable institutions, but aimed to protect certain close relatives of the testator during the death door period.

The Ohio Act interpreted with the underlying philosophy of the *Kirkbride* case<sup>59</sup> will meet its responsibility. A shortening of the one year restricted period, especially where there is no percentage of estate

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<sup>56</sup> *Ibid.*

<sup>57</sup> The approach used in the *Kirkbride* case, *Ibid.*

<sup>58</sup> *Kirkbride v. Hickok, Ibid.*

<sup>59</sup> *Ibid.*



restriction, would not be desirable. However, two minor changes could logically be made: 1. To extend the class to be protected to the spouse; 2. To permit testamentary gifts of \$500 or less to religious purposes to be executed at any time before death.

If a complete reconsideration and revision of the present Ohio Act where contemplated, a model act would provide:

1. A specified class for whom the restriction is to apply. Spouse, children, children of deceased children and adopted children, recommended.

2. A period of time before death when provisions for testamentary and inter vivos gifts must be executed. One year recommended.

3. A minimum net estate from which no testamentary disposition to charities could be made, excepting small religious bequests. \$25,000 recommended. Religious bequest, \$500.

4. A net estate value in excess of which no restriction should apply. \$500,000 recommended.

5. A limitation on the percentage of the estate, between the fixed minimum estate and the maximum net estate, that may be devised or bequeathed to charities. One-half recommended.

An act based on the above would combine the good features of the existing acts and add a more elastic treatment to the problem. The needed protection would be given the close relatives of the testator, yet if the estate is larger than is necessary to give that protection, the overage will be permitted to go to the charitable institution.